WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
APRIL 2015

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Brown
Juneau
Milwaukee
Walworth
Washburn

THURSDAY, APRIL 16, 2015

9:30 a.m.	13AP1619-D	-	Office of Lawyer Regulation v. Paul A. Strouse

TUESDAY, APRIL 21, 2015

9:45 a.m.	13AP1437-CR	-	State v. Hatem M. Shata
10:45 a.m.	13AP2435-CR	-	State v. Fernando Ortiz-Mondragon
1:30 p.m.	14AP1099-CR	-	State v. Maltese Lavele Williams

WEDNESDAY, APRIL 22, 2015

9:45 a.m.	13AP1750	-	Ronald J. Dakter v. Dale L. Cavallino, et al.
10:45 a.m.	13AP1581-CR	-	State v. Richard E. Houghton, Jr.
1:30 p.m.	13AP2742-D	-	Office of Lawyer Regulation v. Thomas O. Mulligan

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage, must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
THURSDAY APRIL 16, 2015
9:30 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case is from Milwaukee.

2013AP1619 Office of Lawyer Regulation v. Paul A. Strouse

In this case, Atty. Paul A. Strouse has appealed a referee's report and recommendation for a 60-day suspension of Strouse's law license and the imposition of full costs of $65,089.79.

Some background: Strouse was admitted to practice law in Wisconsin in 1991. His prior disciplinary history includes public reprimands in 2010 and 2011. He primarily represents debtors in bankruptcy proceedings.

The referee's report in this case arises out of a July 2013 Office of Lawyer Regulation (OLR) complaint charging Strouse with eight counts of professional misconduct, involving four clients; six counts remain at issue at this point in the proceedings.

Faisal Eshai gave his lawyer, Strouse, certain equipment he needed to return, then the equipment was either lost or stolen. Strouse stipulated that he violated supreme court rules by failing to safeguard the equipment and failing to give Eshai a signed written receipt for it**.**

Grant Bleashka claimed Strouse agreed to a "barter for service" agreement and later reneged on that agreement, demanding payment in excess of what the parties had agreed. Strouse disputes this charge, saying he sent Bleashka a bill when he realized Bleashka did not intend to pay him. The referee concluded that Strouse committed misconduct and violated a supreme court rule relating to a lawyer's obligations to communicate regarding fees.

Yolanda White hired Strouse to file a bankruptcy proceeding. A dispute arose as to the total cost of the representation and the referee determined that Strouse violated a supreme court rule relating to a lawyer's obligations to communicate regarding fees.

Elissa and Scott Jacobson hired Strouse to file a bankruptcy proceeding. A dispute arose as to whether Strouse also agreed to represent them regarding discharge of certain student loans then failed to communicate with them about the matter. The referee concluded that Strouse failed to communicate with the Jacobsons and violated other rules of professional conduct.

Strouse contends the referee made inadequate factual findings to support several of the charges and he challenges several of the referee's conclusions of law as well as his recommendation for discipline. Strouse contends that a reprimand is sufficient discipline for his misconduct and asks the Supreme Court to review whether payment of full costs is appropriate in light of the facts in this case.

The Supreme Court is expected to decide whether Strouse committed the misconduct at issue, the appropriate sanction for Strouse's misconduct, and whether full costs are appropriate.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 21, 2015
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Timothy G. Dugan, presiding.

2013AP1437-CR State v. Shata

The central issue raised in this case, as in 2013AP2435-CR, State v. Ortiz-Mondragon, is the scope of defense counsel's obligation to advise defendants of their likely risk of deportation in light of the U.S. Supreme Court's decision in Padilla v. Kentucky, 559 U.S. 356 (2010). Padilla held that constitutionally competent counsel would have advised the defendant that his conviction for drug distribution made him subject to automatic deportation.

Some background: Hatem Shata, an Egyptian national, was charged with possession with intent to deliver marijuana as party to a crime. On Oct. 5, 2012, he appeared in court and Shata's attorney informed the court that Shata was concerned about the immigration consequences of a plea.

Shata's counsel explained that Shata was not a U.S. citizen and that there was a potential he could be deported. Shata acknowledged that, and he informed the circuit court that he wished to go forward with his plea. Shata pleaded guilty to one count of possession with intent to deliver marijuana as party to a crime. He was subsequently sentenced to one year of initial confinement and four years of extended supervision.

On March 15, 2013, Shata filed a post-conviction motion to withdraw his plea claiming that his trial attorney's performance was deficient because counsel failed to inform Shata "that federal law required he be deported following his conviction."

At the ensuing hearing, Shata's trial counsel, Atty. James Toran, testified that he knew Shata was concerned about the possibility of deportation and explained that he knew Shata's conviction would subject him to deportation, but that he did not know it was mandatory. Toran testified that he told Shata there was "a strong chance" that he would be deported. Toran also explained that he "had no viable defense," and that Shata chose to plead guilty because "we could not really prevail if we went to trial[,]" and Shata wanted to take advantage of the State's recommendation for probation. Shata testified that Toran "didn't say for sure" that he would be deported, and that he would not have pleaded guilty if he had known that his deportation was "mandatory."

The circuit court found "the testimony of Mr. Toran to be credible under the circumstances, that he did advise Mr. Shata, unlike Padilla, that there was a strong likelihood that he would be deported." The court rejected Shata's testimony "that Mr. Toran told Mr. Shata that he would be getting probation and would go back to New Jersey and nothing would happen."

Shata appealed. A majority of the Court of Appeals reversed, holding that Shata's attorney, who advised Shata that he faced a "strong likelihood" of deportation, had performed deficiently under Padilla's mandate that "counsel must inform her client whether his plea carries a risk of deportation." Padilla, 559 U.S. at 374.

The Court of Appeals remanded with directions to permit Shata to withdraw his guilty plea.

The state maintains that the Court of Appeals' majority misapplied Padilla in holding that Shata's attorney had to do more. Indeed, the state asserts that the "majority opinion in this case not only extends beyond the requirements of Padilla by imposing a new and far more stringent standard on defense attorneys in terms of how they must advise clients who face deportation due to their criminal convictions, it does so without a clear explanation of what they have to do to satisfy that standard."

The state is also aggrieved that, rather than remanding the case to permit the circuit court to perform the required analysis, the majority simply held that "Shata was prejudiced" and that "because of the inaccurate and prejudicial advice Shata received from counsel, he is entitled to withdraw his guilty plea." The state contends that "[a]t a minimum, the Court of Appeals should have remanded the case to the circuit court for additional analysis and related findings" citing a similar case in which this was done. See Mendez, 354 Wis. 2d 88, ¶¶12, 17.

A decision by the Supreme Court is expected to clarify the scope of defense counsel's obligation to advise defendants of their likely risk of deportation in light of the U.S. Supreme Court's decision in Padilla v. Kentucky, 559 U.S. 356 (2010).

WISCONSIN SUPREME COURT
TUESDAY, APRIL 21, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a Brown County Circuit Court decision, Judge Donald R. Zuidmulder, presiding.

2013AP2435-CR State v. Ortiz-Mondragon

This criminal case examines the scope of defense counsel's obligation to advise defendants of their likely risk of deportation. A decision by the Wisconsin Supreme Court could clarify what constitutes a clear consequence under Padilla v. Kentucky, 559 U.S. 356 (2010) and what the Sixth Amendment requires of defense attorneys who represent non-citizens and clients.

In Padilla, the U.S. Supreme Court held that constitutionally competent counsel would have advised the defendant that his conviction for drug distribution made him subject to automatic deportation.

Some background: Fernando Ortiz-Mondragon was an immigrant from Mexico who had been living and working in the United States since 1997. He has four children who are U.S. citizens and reside in Wisconsin. He had no prior criminal history.

Ortiz-Mondragon was originally charged with substantial battery, false imprisonment, felony intimidation of a victim, criminal damage to property, and disorderly conduct, all with a domestic abuse enhancer. The charges all arose out of a single episode.

He subsequently entered into a plea agreement whereby the state dismissed the false imprisonment and intimidation charges, and the defendant pled guilty to the remaining charges. The circuit court imposed a jointly recommended sentence of three years of probation with four months' conditional jail time.

The plea form that he signed stated: *I understand that if I am not a citizen of the United States, my plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law.*

After completing the jail time, Ortiz-Mondragon was taken into custody by immigration and customs enforcement and removal proceedings were commenced. In order to avoid having a deportation on his record, he agreed to a voluntary departure.

Ortiz-Mondragon filed a motion for plea withdrawal, arguing his attorney was ineffective in failing to inform him that his plea would result in mandatory deportation and permanent inadmissibility to the United States, as opposed to merely informing him that those consequences were a possibility. The motion argued that the conviction for substantial battery as an act of domestic abuse made the defendant ineligible to apply for cancellation of his removal from the United States because the crime is considered to involve moral turpitude and is not eligible for any exception.

Ortiz-Mondragon argued that defense counsel had a duty to inform him of the mandatory immigration consequences of the plea under Padilla. He also argued that counsel's deficient performance prejudiced him because if he had known about the mandatory immigration consequences of the plea, he would have either tried to negotiate a different plea agreement or would have insisted on going to trial.

The circuit court denied the motion without holding a proper hearing. The circuit court reasoned that because the law was not sufficient and straightforward as to what types of crimes involve "moral turpitude," defense counsel did not have to do anything more than advise the defendant that pending criminal charges may carry a risk of adverse immigration consequences. The circuit court said the record affirmatively established that trial counsel made this advisement. The defendant appealed, and the Court of Appeals affirmed.

The Court of Appeals agreed with the circuit court that defense counsel was not deficient in failing to unequivocally inform the defendant that his plea would result in deportation and permanent inadmissibility.

Ortiz-Mondragon argues a person facing potential banishment from his family and the life he has built over the course of many years would want to know more than what is contained in a general plea form because the warnings in the form do not communicate a thoughtful assessment of risks or how great the chance is that the crime to which the defendant is pleading will result in deportation or exclusion.

The state says that the immigration statute neither defines nor gives examples of crimes of "moral turpitude," and it is difficult to determine if a given crime will be treated as one of moral turpitude by either the Board of Immigration Appeals or the federal courts. Therefore, the state's argument was that the deportation consequences of this defendant's plea were not clear.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 21, 2015
1:30 p.m.

This is a certification from the Wisconsin Court of Appeals, District I (headquartered in Milwaukee). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Milwaukee County Circuit Court, Judge Jeffrey A. Wagner, presiding.

2014AP1099-CR State v. Williams

This certification involves the appeal of a murder conviction. A decision by the Supreme Court is expected to resolve a potential conflict in two prior court decisions relating to sufficiency of evidence challenges: State v. Wulff, 207 Wis. 2d 143, 557 N.W.2d 813 (1997), in which the evidence was measured against the instructions the jury actually received; and State v. Beamon, 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681 in which the evidence was measured against the statutory requirements.

Some background: A jury found Maltese Lavele Williams guilty of two counts of felony murder. The verdict was based on Williams' involvement in the shooting deaths of two men during an attempt to take marijuana from the home of one of the victims, a drug dealer whose name was Parker. This appeal involves issues related to the death of the other victim, a man named Robinson, who was in Parker's home at the time.

The felony murder statute requires an underlying crime, and in this case, that crime was attempted armed robbery. *See* Wis Stat. § 940.03. Armed robbery requires the taking of "property from the person or presence of the owner." *See* Wis. Stat. § 943.32(1). The trial evidence was sufficient to support a finding that Williams and his accomplices attempted to take marijuana from Parker and, therefore, as pertinent here, was sufficient to support a finding that Williams attempted an armed robbery of Parker.

However, the Court of Appeals wrote that there does not appear to be sufficient evidence to support a finding of an attempted armed robbery of *Robinson*. This is significant because the jury was instructed that Williams could be found guilty of the felony murder of Robinson only if there was an attempted armed robbery of Robinson.

On the other hand, the Court of Appeals said it perceived no dispute that, under the applicable statutory scheme, all that was required to sustain a conviction on the felony murder count for Robinson's death was proof of an attempted armed robbery of Parker.

In Wulff, the Supreme Court reversed a conviction, and directed that the circuit court enter a judgment of acquittal, because the evidence was insufficient when measured against the jury instructions. Wulff, 207 Wis. 2d at 144, 149-54.

In Beamon the Supreme Court measured sufficiency of the evidence against the statutory requirements. Beamon, 347 Wis. 2d 559, ¶¶3, 40, 50. The crime there was "fleeing or attempting to elude a traffic officer."

The court in Beamon explained that one of the statutory requirements for this crime can be proven in three alternative ways. One statutory alternative requires proof that the defendant increased the speed of his vehicle to flee. The evidence in Beamon was sufficient to support at least one other alternative, but not sufficient to support the increasing-speed alternative.

The court in Beamon explained that the jury instructions "combined" alternatives in a way that made the increased-speed alternative a requirement. The court determined that the instructions were erroneous because they "added" a requirement to the statutory definition of the crime. The Beamon court concluded that, because the instructions added a requirement and "created a charge that does not exist," the sufficiency of the evidence should be measured against the statute instead of the instructions.

The Court of Appeals said it was uncertain whether Williams is more like Wulff or more like Beamon. Williams argues that Wulff requires that the evidence be measured against the jury instructions; the state argues that Beamon controls and requires that the evidence be measured against the statutory requirements.

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 22, 2015
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Juneau County Circuit Court decision, Judge John P. Roemer, presiding.

2013AP1750 Dakter v. Cavallino

This negligence case arises from an accident between a semi-trailer truck and a car in which the driver of the car was badly injured. The central issue is whether the "superior skills" doctrine applies in a motor vehicle negligence action, such that a commercial truck driver is held to a higher standard of conduct than an ordinary automobile operator.

Some background: The accident occurred in Juneau County during May of 2008. Ronald Dakter was driving northbound on Highway 80 when he made a left-hand turn onto State Highway 82 (Tilmar Road) into the path of a semi-trailer being driven southbound on Highway 80 by Dale Cavallino.

Traffic on Highway 80 has the right-of-way and a right-turn lane for southbound traffic. Cavallino, who was travelling below the posted speed limit, testified at trial that his truck remained in the through lane on Highway 80. As he approached the intersection, Cavallino testified that Dakter suddenly turned in front of him.

Cavallino argued during pretrial motions, and to the jury, that Dakter violated his right-of-way, was negligent as to lookout, and that Dakter's unexpected turn created an emergency immediately before the collision. Other defendants named in the lawsuit include Cavalliono's employer, Hillsboro Transportation Company, LLC, and its insurer, Michigan Millers Mutual Insurance Company.

In contrast, Dakter argued that Cavallino was travelling too fast for conditions, failed to keep a proper lookout, and violated truck-driving safety standards.

Over Cavallino's objection, the circuit court issued a jury instruction that Cavallino claims had the "practical effect of telling the jury that Cavallino must be held to a higher standard of care because he possessed a commercial driver's license and had special training."

Cavallino moved for a new trial based on the jury instruction, which included language used in professional negligence cases against health-care professionals.

The circuit court denied the motion, stating that the instruction accurately stated the law. Cavallino appealed, challenging the judgment on a variety of grounds. Dakter cross-appealed certain evidentiary rulings.

The Court of Appeals affirmed.

While acknowledging that the duty of care is the same, the Court of Appeals added that jurors may consider the actor's superior knowledge or skills when the knowledge or skills give the actor an ability to avoid injury or damage to others. If someone "has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor *has behaved as a reasonably careful person*."

Cavallino contends that the use of "professional negligence" language in the instruction was improper and directly contrary to existing law.

Cavallino cites Saxby v. Cadigen, 266 Wis. 391, 396-7, 63 N.W.2d 820 (1954) (duty of care when driving does not depend on "skill" or "experience"). Cavallino contends the Court of Appeals' decision finding of "harmless error" will have "a far-ranging impact in motor vehicle negligence cases and will extend beyond cases involving commercial truck drivers."

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 22, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Milwaukee), which reversed a Walworth County Circuit Court decision, Judge John R. Race, presiding.

2013AP1581-CR State v. Houghton

The central question in this case is whether a traffic stop based on a police officer's mistaken understanding of the law is in violation of the Fourth Amendment or the Wisconsin Constitution, and whether evidence obtained as a result of such a stop should be suppressed.

Under existing Wisconsin law, a traffic stop by a law enforcement officer must be based upon probable cause (if the officer directly observed a crime or traffic violation) or reasonable suspicion (if the officer believes that a crime or traffic violation is occurring or is about to occur and additional investigation is needed). Prior Wisconsin cases have stated that the officer cannot have probable cause or reasonable suspicion if the officer's belief of a crime or traffic violation is based on an erroneous understanding of the law. See, e.g., State v. Brown, 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66; State v. Longcore, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999).

The Wisconsin Supreme Court will be reviewing that prior case law in light of the recent U.S. Supreme Court decision in Heien v. North Carolina, No. 13-604. Heien held that a determination of reasonable suspicion, even if based on a mistaken understanding of what the law prohibits, can support a temporary traffic stop and investigation, provided the officer's mistake of law is objectively reasonable. If it is not objectively reasonable, there could be no finding of reasonable suspicion under Heien. Moreover, the officer's subjective belief in the proper interpretation of the law is not relevant.

Some background: Richard E. Houghton, Jr. pled guilty to possession of THC with intent to distribute. An East Troy officer had stopped Houghton's vehicle, which was licensed in Michigan, because the officer believed that the vehicle had three traffic violations: (1) no front license plate, (2) a pine-tree-shaped air freshener hanging from the rearview mirror, and (3) a GPS unit attached to the lower left corner of the windshield.

Houghton filed a motion to suppress, arguing that the traffic stop had not been supported by either probable cause or reasonable suspicion. Houghton asserted that Michigan, where his vehicle was registered, only provides a rear license plate, which meant that the vehicle was in compliance with the law. He also contended that he did not violate Wis. Stat. § 346.88(3)(b) because neither the air freshener nor the GPS unit obstructed his view through the front windshield.

At the evidentiary hearing on the motion, the police officer testified that he believed Wisconsin law to require a front and rear license plate on all vehicles. He also believed that Wis. Stat. § 346.88(3)(b) prohibited any type of obstruction on the front windshield.

The circuit court denied the suppression motion. It concluded that the officer's belief that two license plates were required by Wisconsin law was reasonable. It did not rule on whether the windshield obstruction statute was violated by the air freshener or the GPS unit, although it

noted that "there must be a zillion cars driving around with air fresheners and not very many of them would get stopped by the traffic officer."

The Court of Appeals reversed, holding that the officer could not base probable cause on his mistaken belief that the law required both front and back license plates and that the air freshener and GPS units did not violate the relevant traffic law.

The state asserts that since the U.S. Supreme Court has now held that an officer's reasonable suspicion of a crime or traffic violation can be based on a mistake of law, prior Wisconsin opinions, especially Longcore, should be revisited.

Houghton asserts Heien relates to the reasonable suspicion standard while his case relates to the probable cause standard. Houghton contends that the officer was not stopping him to engage in an investigative detention, as was the case in Heien, but rather, because the officer directly observed the missing license plate, the officer stopped him to cite him for traffic violations, which required a finding of probable cause.

A decision by the Wisconsin Supreme Court is expected to clarify whether Heien should be applied only to stops where reasonable suspicion is required and not to stops where probable cause is required. A decision also may clarify whether Wis. Stat. § 346.88(3)(b) prohibits any obstruction to the driver's clear view through the front windshield, or only obstructions that materially interfere with the driver's view through the front windshield.

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 22, 2015
1:30 p.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case is from Spooner.

2013AP2742 Office of Lawyer Regulation v. Thomas O. Mulligan

In this case, Atty. Thomas O. Mulligan has appealed a referee's report and recommendation for an 18-month suspension of Mulligan's law license, $7,500 restitution, and the imposition of full costs of $13,823.34.

Some background: Mulligan was admitted to practice law in Wisconsin in 1985. His prior disciplinary history includes two private reprimands in 1997 and 2005, and a public reprimand in 2009. He practices in Spooner.

The referee's report in this case arises out of a December 2013 Office of Lawyer Regulation (OLR) complaint charging Mulligan with eight counts of professional misconduct, involving two client matters and trust account issues. Only one count remains at issue. Mulligan asserts that he did not commit misconduct under SCR 20:8.4(c), that his other ethical violations were *de minimis*, that restitution is not appropriate, and that a private or public reprimand and reduced costs are sufficient.

Mulligan represented Richard Wylie, who faced criminal charges. No fee agreement was signed and Mulligan deposited fees into his business account rather than his trust account. The referee determined that Mulligan violated trust account rules and rules relating to written fee agreements.

Andrea Brown hired Mulligan to represent her in a divorce. Mulligan did not place her fee into his trust account. The referee determined that Mulligan violated trust account rules in this matter.

While investigating client matters, the OLR discovered other trust account anomalies; Mulligan deposited personal funds into his trust account and used funds from his trust account to pay for personal obligations. He did not maintain all of the records required by court rule. The referee determined that Mulligan violated trust account rules and also engaged in misconduct in violation of SCR 20:8.4(c).

Mulligan argues that his conduct did not involve dishonesty, fraud, deceit, or misrepresentation and thus did not violate SCR 20:8.4(c). He also asserts that the referee erred by making findings that exceeded the scope of this proceeding, such as opining that Mulligan's representation of Wylie was substandard, which was not alleged, and making extraneous inquiries such as taking judicial notice of Mulligan's trust account certifications. He objects to the referee's recommendation for restitution to Wylie, noting that the OLR did not seek restitution and claiming he had inadequate notice that it might be imposed.

The Supreme Court is expected to decide whether Mulligan committed the misconduct at issue, the appropriate sanction for Mulligan's misconduct, and whether restitution and full costs are appropriate.